(34) (31)

Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Arkansas

REPLY BRIEF FOR RESPONDENTS REPUBLICAN PARTY OF ARKANSAS AND W. ASA HUTCHINSON SUPPORTING PETITIONERS

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STATEMENT

Rather than accepting this case as a policy choice made by the People of Arkansas, respondents would portray it as a clash between the national government and a renegade state government bent on defying the national interest. The implication is that Arkansas voters are qualifying their own right to choose representatives for reasons unrelated to the formulation of sound national policy. But properly understood, the People of Arkansas are acting not defiantly but altruistically, allowing the public to recapture Congress from entrenched incumbents bent on serving narrow parochial interests.

Amendment 73 addresses a classic "collective action" problem by "pre-commiting" the Arkansas electorate to a specific pattern of voting behavior.[1] Incumbents seem to benefit local interests because, as they gain power in Congress, they are better able to "deliver the goods" in the form of "pork" and other benefits to their local districts. But when Congress is organized on this principle, inefficiencies result and everyone suffers in the long run. Popular appreciation of this fact is strongly evidenced by the widespread dissatisfaction with Congress as a whole, but the seemingly contradictory citizen approval for their own members of Congress.[2] Amendment 73 allows Arkansans to join citizens of other States to solve the dilemmas of entrenched incumbency.

An amendment to the federal Constitution might appear to be the best solution for the collective action problems of incumbency. However, the easiest method of amending the Constitution—indeed, the only method that has ever succeeded—requires a supermajority in both Houses, each of

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[1] *See* Cass R. Sunstein, *After the Rights Revolution*, 48-52 (Harvard 1990); Jon Elster, *Intertemporal Choice and Political Thought*, in Lowenstein and Elster, eds, *Choice over Time* (Russell Sage Foundation, 1992).

[2] While perhaps portrayed otherwise, the recent election results are consistent with this view. In the House, for example, not a single Republican incumbent lost. Republican gains came mostly from 22 captured Democratic open seats and 17 defeated freshman Democrats.

which is beholden to long-term incumbents. Amendment 73 and similar popular initiatives in other States[3] solve this dilemma by signaling, far more decisively than any *ad hoc* action, Arkansans' willingness to contribute to the national collective good of a rotation of representatives. By so doing, Arkansas and States that follow its lead make the drastic step of a constitutional amendment less necessary. More importantly, by using State action in the national interest to correct undemocratic impulses in Washington, they have employed precisely the check that the Framers had in mind.

Respondents and their amici suggest that Amendment 73 was framed as a ballot-access measure to skirt putative constitutional limits on "state power to add qualifications." Hill Br. at 27; *accord* Thornton Br. at 39; United States Br. at 23. Fairly understood, however, Amendment 73 has more to do with democratic principles than constitutional law. As written, it merely creates a rebuttable presumption against the re-election of long-serving incumbents. With no experience to judge from, it is pure speculation to question whether mobilized electorates will be able to overcome Amendment 73's presumption and re-elect incumbents rather than new candidates. *See, e.g.*, Thornton Br. at 41-42.

The People of Arkansas demurred from imposing an absolute bar on incumbent service because they expected that some incumbents, even if deprived a place on the ballot, might still command a majority of the electorate. If a less popular candidate were seated only because an incumbent write-in candidate was disqualified from service, the seated candidate's legitimacy as a servant of the People would inevitably be compromised. By stopping short of an absolute bar, therefore, Arkansans have encouraged turnover without ultimately binding themselves to electing their second choice.

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[3] In the recent election, seven States passed Congressional term-limits proposals by referendum. Now 22 States have Congressional term-limits provisions in effect. *See* 52 Congressional Quarterly 3251 (Nov. 12, 1994).

ARGUMENT

Amendment 73 survives constitutional scrutiny whether considered as a ballot-access provision or a qualification. The Constitutional text, structure, history, and later interpretation in Congress all demonstrate the Framers' intention to reserve to the States and the People the authority to set reasonable qualifications for their representatives in Congress. Moreover, as demonstrated by our fellow parties, Amendment 73 may also be sustained under Art. I § 4 as a ballot-access regulation.

This case cannot turn on whether Amendment 73 is called a qualification or a ballot-access measure. On this score, the debate is reminiscent of one not long ago in which the Court dismissed arguments over whether Congress had delegated "legislative" rather than "executive" powers to a "Board of Review" on the ground that the label applied did not matter. *See Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airport Auth.*, 501 U.S. 252 (1991). The same is true here. No matter how much respondents want to focus on the labeling issue, Amendment 73 is constitutional regardless of how it is categorized.

I. THE CONSTITUTION PERMITS STATES AND THE PEOPLE TO SET QUALIFICATIONS FOR MEMBERS OF CONGRESS

The Tenth Amendment provides that "[p]owers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, *or to the people.*" Amend. X (emphasis added). Respondents here do not claim that power to set qualifications has been delegated to the United States; indeed, they hotly deny it. *See* United States Br. at 7-10; Thornton Br. at 31-32. They are forced, then, either to identify specific Constitutional prohibitions on the States' and the People's authority to limit Congressional terms, or else to concede that Amendment 73 passes muster. As shown below, respondents have failed to identify any such prohibition. Accordingly, Amendment 73 is

within the retained authority both of Arkansas and of its People.

A. The Supposed Article I "Prohibitions" on Additional Qualifications. The Arkansas Supreme Court held that Amendment 73's "restriction on eligibility to stand for election to the U.S. Congress is violative of the respective Qualification clauses of Article 1 of the U.S. Constitution." *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 355 (Ark. 1994). But respondents do not directly defend that position since they cannot claim that Amendment 73 "violates" the express terms of the Disqualification Clauses or any other specific provision of the Constitution.

What the Arkansas court termed the "Qualification Clauses" are actually *Dis*qualification Clauses, having been deliberately drafted as such in Philadelphia. *See* Opening Br. at 4; pp. 11-14 *infra*. These Clauses, framed in the negative, can only be read to set forth minimum, not exclusive, qualifications. Respondents' sole reply is to argue that dictum in *Powell v. McCormack*, 395 U.S. 486 (1969), compels this Court to interpret not the ratified Constitution but its penultimate draft, as submitted to the Convention's Committee of Style. Hill Br. at 14-15. But that claim was definitively answered by *Nixon v. United States*, 113 S. Ct. 732 (1993), where the Court observed that "we must presume that the Committee[] [of Style's] reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." *Nixon* thus rejected once and for all respondents' claim that "the *second to last draft* [should] govern in every instance where the Committee of Style added an arguably substantive word." *Id.* at 737. (emphasis added)

The equally clear text of Article VI, Clause 3 confirms that the Disqualification Clauses mean what they say:

> The *Senators and Representatives* before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and

> of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Art. VI cl. 3 (emphasis added). This express prohibition on religious tests for, *inter alia*, "Senators and Representatives," would have been unnecessary had Article I's disqualifications been exhaustive. *See* Opening Br. at 8-9.

Respondent Hill replies with the half-hearted suggestion that, in drafting the religious-test ban, the Framers meant to imply "except Congress." *See* Hill Br. at 23 n.51. But as explained in our opening brief, the religious-test prohibition was intentionally drafted to exclude those State officers covered by the Oath or Affirmation requirement immediately preceding it. Had the Framers wanted to further narrow the religious-test provision as respondent Hill suggests, the natural way to do so would have been to repeat the appropriate phrase from earlier in the clause, and thus to apply the ban only to "executive and judicial officers [] of the United States." Remarkably, respondent Thornton's answer is even less persuasive, resting, as it does, on combination of non-sequitur, Thornton Br. at 19 n.18 (*citing* 2 *The Debate on the Constitution* at 556 (Bernard Bailyn ed., 1993)) and an entirely non-substantive citation, *see id.* (*citing* 2 Max Farrand, *The Records of the Federal Convention of 1787* at 342, 468 n.24 (Yale 1937) ("*Farrand*").

B. The Tenth Amendment Reservation of Power "to the States, respectively." Effectively conceding, that the Disqualification Clauses do not actually "prohibit" Amendment 73, respondent Thornton next argues that the Tenth Amendment is overridden by what he calls the "comprehensive regulation" of federal legislators in Article I. Thornton Br. at 4. According to Thornton, this regulation essentially occupies the field except in those "few instances" where the Framers "made an explicit and circumscribed

delegation of the subject to the States." *Id.* at 15. But this imaginative argument cannot compensate for the absence of a prohibition in Constitutional text itself.

First, respondent Thornton's argument reverses the canon of construction expressly provided in the Tenth Amendment. The Constitution's structure and history are predicated on the theory, later codified in the Tenth Amendment, that States retain all authority except that expressly surrendered to the United States. As this Court has recognized, "[t]he Constitution never would have been ratified if States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985).

Second, respondent effectively asks the Court to take the unprecedented step of applying statutory "field preemption" doctrines to a constitutional claim. *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). But the *constitutional* preemption test, adapted from *The Federalist* No. 32, permits a finding of implied preemption only "where [the Constitution] granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Goldstein v. California*, 412 U.S. 546, 553 (1973) (citing *The Federalist* No. 32) (emphasis in original). Thus, *Goldstein's* "totally contradictory and redundant" test, not the statutory field-preemption doctrine governs. Any other result would eviscerate the Tenth Amendment.

Third, the Art. I, § 4 Elections Clause is not a delegation of power to the States, as Thornton's argument assumes, but a mandate imposed on States. The Elections Clause, inspired by the bitter experience of the Framers at the Convention, is aimed at guaranteeing the participation of State representatives in Congress. As George Read explained to a fellow delegate a full week *after* the Convention was due to open:

> We have no particular accounts from New Hampshire . . .. Maryland, you may probably have heard more certain accounts of than we who are here. Rhode Island hath made no appointment [of delegates] yet. The gentlemen who came here early, particularly Virginia . . . express much uneasiness at the backwardness of individuals in giving attendance.

Charles Warren, *The Making of the Constitution* 115 (1928) ("*Warren*"). Eventually, all delegations except Rhode Island did attend the convention, but several missed critical parts of the proceedings.

Fearing that a lack of participation might be a recurring problem in national councils, the Framers' solution was, first, to compel States to hold Congressional elections and, second, to permit Congress itself to hold such elections if a State refused to do so. *Cf. 2 The Debates in the Several States Convention on the Adoption of the Federal Constitution*, 24 (Elliot ed. 1888) ("*Elliott*") (explanation of the need for the clause); *id.* at 552 (rejected proposal to limit its use to such situations). The Elections Clause thus provides that Congress *may* prescribe time, place, and manner rules, but that States *shall* do so. The relation between this clause and States' reserved powers is analogous to that between the clause vesting "executive power" in the President, *see* Art. II, § 1, and the one requiring the President to "take Care that the Laws be faithfully executed." *See* Art. II, § 3. In each case, the clause imposing a duty presumes power provided elsewhere. In the case of the Election Clause, that power comes from the inherent, reserved authority of the States to hold elections for the People's representatives in Congress.

Fourth, The Solicitor General suggests that neither Congress nor the States can regulate Congressional terms, apparently on the theory that Congressmen enjoy a sort of *extra-textual* constitutional immunity from such regulation. *See* United States Br. at 7-16. But when the framers wanted to

create a Congressional immunity, they knew how to do so. Indeed, Article I includes a specific list of Congressional immunities, but that list does not include the supposed immunity from State electoral regulation. *See* Art I, § 6, cl. 1 (privileges against arrest; Speech or Debate Clause). In light of the Tenth Amendment's canon of construction, the absence of any express immunity from term limits proves that no such immunity exists. *See Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160 (1993).

C. The Tenth Amendment Reservation of Power to "the People." None of respondents' many errors is more fundamental than their insistence on treating this case as if it involves State power *alone*. After all, it was the People of Arkansas, not the State legislature, who enacted Amendment 73. To be sure, the People bound the State to assert its own authority on their behalf, but that fact does not rob the original voter-initiative of its singularly democratic character. Accordingly, two sources of reserved power under the Tenth Amendment, not one, are at issue here.

The distinction between a State's authority and that of its People was critical to the Founding. The Articles of Confederation established the first national government exclusively on the basis of State authority. *See* Articles of Confederation Preamble (stating that "the undersigned Delegates of the States . . . agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, [etc.]"). Article II of the Articles of Confederation did not mention the people but instead said that "Each *State* retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States." (emphasis added).

The Framers of the Constitution consciously rejected this legacy and erected a new Constitution in the name of the People. Accordingly, the Constitution begins, "We *the People*

of the United States," and ends by requiring its own ratification through popular convention, not State legislation. *See* Art. VII. The Tenth Amendment makes this conception even more explicit, reserving power not vested in the federal government, to the States *and* the People. Thus, the Constitution assigns power to the People over and above any reservation of authority to the States.

Significantly, Art. I § 2, cl. 1 assigns to "the People of the several States" the right to "choose" representatives, and the Seventeenth Amendment assigns to the People "of each State" the right to "elect" Senators. *See* Art. I, § 2, cl. 1; Amend. XVII. Under Amendment 73, the People of Arkansas exercised this right of choice, by establishing rules that presume non-incumbents will be "chosen" ("elected") at least in every fourth House and third Senate election. Equally important, Amendment 73's presumptions were approved by a majority of voters—the very method by which the electorate selects Representatives and Senators. The issue, then, is not who may choose representatives. It is whether the People's expressly assigned powers under Article I, the Seventeenth Amendment, and the Tenth Amendment, include the power to establish presumptive rules of decision, or whether the People must instead exercise complete discretion at every election.

Respondents reject the People's right to pre-commit themselves to rotation, insisting that the Constitution *mandates ad hoc* decisionmaking. Yet there is nothing in the Constitutional text that even suggests, much less requires, this result. Article I, for example, says only that Representatives must be "chosen every second year by the People of the several States"; it does not say that they must be chosen by *ad hoc* decisionmaking. Precommitments, voluntarily made, are as valid a means of choosing as case-by-case decisionmaking. Indeed, in light of the collective action problem described above, precommitment may well be the only means of reaching an outcome that is in the national interest. Despite respondents' pretended solicitude for popular sovereignty, it is

Amendment 73's opponents, not its supporters, who advocate restricting the authority of the People.

Nor was precommitment of the kind reflected in Amendment 73 unanticipated at the Founding. The Convention itself required that Congressional elections occur within the boundaries of particular States, rejecting proposals to hold them across State lines. *See Warren* at 115-16. This rule creates constituencies of greatly disparate size which, were they not constitutionally mandated, would be constitutionally prohibited.[4] The reason for the Framers' seeming abrogation of democratic principle in this instance is apparent—requiring that elections be conducted within State boundaries gives the People the option of regulating by State law their own choice of a delegation to the Congress. That power is, of course, constrained by the substantive guarantees in the First and Fourteenth Amendments.[5] But, subject to these constraints, it lies entirely in the People's hands.

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[4] *See Karcher v. Daggett*, 462 U.S. 725 (1983) (invalidating New Jersey's Congressional districts on account of population variances of less than one percent). For example, Montana's single House Member represents over 820,000 people, whereas Wyoming's Member represents fewer that 500,000. Two Senators represent more than 30 million Californians, whereas another two Senators represent Wyoming's relatively small population. *See Congressional Districts in the 1990's* (1993).

[5] The Solicitor General implies that Amendment 73 constitutes an infringement of the rights of a minority by voters in the majority, *citing Lucus v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964). United States Br. at 16. Unlike *Lucus*, however, where a redistricting scheme burdened a particular class of voters in Colorado's Denver metropolitan area, no such class has been identified here. Additionally, the Solicitor General implies that the rights of voters of individual Congressional districts might have been infringed by the statewide electorate. *Id.* at 15-16. Because Congressional districts are creatures of State law, however, no such infringement is possible. *See Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993).

II. THE HISTORICAL RECORD CONFIRMS THAT STATES AND THE PEOPLE MAY SET QUALIFICATIONS FOR MEMBERS OF CONGRESS.

In interpreting the Constitution, "the plain language of the enacted text is the best indicator of intent." *Nixon*, 113 S. Ct. at 737. But should the Court nonetheless decide to tour the historical record, it will find that it only reinforces the plain meaning of the Constitutional text. As demonstrated below, the history of (1) the Disqualification Clauses, (2) several unenacted Constitutional provisions, and (3) Congress' application of Article I, all confirm that the Framers expected States and the People to set reasonable qualifications for Congressional office.

A. The Evolution of the Disqualification Clauses. The Disqualification Clauses, like virtually every other provision of the Constitution, were framed by the Convention's two drafting Committees—the Committee of Detail and the Committee of Style. As the drafting progressed, the clauses that became Art. I, § 2, cl. 2, and § 3, cl. 3 evolved from a form setting unambiguously exclusive qualifications, to an intermediate and unclear form, and finally to the current non-exclusive form. This history, which demonstrates that Article I's Disqualification Clauses were not intended to be exclusive, is summarized below.

On May 25, 1787, the Convention officially convened (almost two weeks late) when a quorum of State delegates finally arrived in Philadelphia. *Warren* at 120. After dispensing with preliminary matters, the Convention soon resolved itself into a Committee of the Whole, which deliberated continually until June 19. The work of the Committee of the Whole was occupied entirely with considering, point by point, various resolutions presented by Edmund Randolph (the so-called "Virginia Plan"). As Madison later explained:

> The Resolutions proposed by him [Randolph] were the result of a consultation among the [Virginia] deputies, the whole number, seven, being present. The part which Virginia ha[d] borne in bringing about the Convention suggested the idea that some such initiative step might be expected from their deputation; and Mr. Randolph was designated for that task. . . . Mr. R. was made the organ on the occasion, being then the Governor of the State, of distinguished talents, and in the habit of public speaking.

*Warren at 141 (*quoting *9 Writing of James Madison* 502 (Hunt ed.)). After nearly a month's work, the Committee on the Whole reported out nineteen resolutions on June 20.

The Convention thereafter sat continually (except for the national holiday on July 3 and 4), considering these "Randolph Resolutions" until July 26. It then recessed for eleven days (its only recess other than the holiday) to allow a Committee of Detail to draft and report a Constitution conforming to the Randolph Resolutions, as amended by the Convention. Randolph himself was a member of the Committee of Detail, as were James Wilson and its Chairman, John Rutledge.

On August 6, the Committee reported to the Convention a draft Constitution. 2 *Farrand* at 177-89. The Convention proceeded to consider and revise this draft, provision by provision, until mid-September. By September 8, most of the work had been completed, and a Committee of Style (which included Madison, Hamilton, and Rufus King) was appointed to rewrite and rearrange the Committee of Detail's draft, as amended. Five days later, the Committee of Style reported a rephrased and rearranged version of the Constitution. After last-minute changes, the Constitution was signed on September 17, 1787.

The first known version of the Disqualification Clauses appeared in a draft Constitution written in Randolph's hand for the Committee of Detail. Historians agree that this manuscript "undoubtedly represents the first and basic draft of the Constitution." *See Warren* at 386; Max Farand, *The Framing of the Constitution of the United States* 125 (Yale 1913). In Randolph's draft, the predecessor of Art. I's Disqualification Clause provided that "delegates shall be the age of twenty five years at least, and citizenship *and any person possessing these qualifications may be elected except.*" 2 *Farrand* 139 (emphasis added). On the original manuscript, however, the words italicized above were crossed out. Elsewhere on the draft were written various notes authored by Randolph or the Committee Chairman, John Rutledge. *See Warren* at 386; *Farrand, The Framing of the Constitution* 125 (Yale 1913). The implication historians have drawn from this evidence is that Randolph, the floor manager for the Virginia Plan, presented a first draft Constitution to the Committee, which then considered and revised it under the direction of Chairman Rutledge. *Id.* From the italicized lanauge above, it seems beyond dispute that the Committee of Detail intentionally rejected language that unequivocally would have set exclusive qualifications for members of Congress.

As ultimately reported by the Committee of Detail, an intermediate version of what became the Disqualification Clauses was phrased positively but ambiguously:

> Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election, and shall be, at the time of his election, a resident of the State in which he shall be chosen.

2 *Farrand* at 178. This language was later reshaped by the Committee of Style, however, into the familiar, unambiguous, non-exclusive form it assumes today: "No person shall be a Representative . . .." Art. I, § 2, cl. 2. The Framers thus

consciously amended successive versions of the Disqualification Clauses until they took their present, non-exclusive form.[6]

Confronted with this evidence, respondents insist on mischaracterizing the Randolph draft as "Randolph's notes," *see e.g.*, Thornton Br. at 13 n.8, 22-23, and greatly downplaying the role of the Committee of Detail. *Id.* at 22-23. In fact, what respondents call "Randolph's notes" were "undoubtedly . . . the first and basic draft of the Constitution." *Warren* at 386. Moreover, at the time the draft was composed, the Committee of Detail *was* the Convention, the remainder of the delegates having been allowed to recess while it completed its labors. Like every other word of the Constitution, the Disqualification Clauses were painstakingly framed by the Founders. They mean exactly what they say.

B. Drafting History of Unenacted Provisions. With the most relevant history against them, respondents place their emphasis on less relevant material—especially, debates

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[6] Interestingly, although the language reported by the Committee of Detail was phrased ambiguously and in positive terms, there is evidence that the Committee had also considered a somewhat clearer, negative version. In addition to the Randolph draft, two later Committee of Detail drafts of the Constitution in James Wilson's hand (again with emendations by Rutledge) also exist. The earlier of these, after correction, reads almost precisely as did the Committee's final product:

> Every member of the House of Representatives shall be of the Age of twenty five Years at least; shall have been a citizen in the United States for at least three Years before his Election, and shall be, at the Time of his Election, a Resident of the State in which he shall be chosen.

2 *Farrand* at 153. This first Wilson draft includes, however, the marked out words "No person shall be capable of being chosen." *Id.* Thus, the Committee of Detail considered the very clarification ultimately made by the Committee of Style. Why the first Committee should prefer ambiguous phrasing to both the unambiguously exclusive language of Randolph's draft and the unambiguously non-exclusive language of the Wilson's is not known.

during the Convention and ratification over provisions that do *not* appear in the Constitution. First, respondents claim that if the Constitution were understood to *permit* term limits, its anti-federalist opponents would not have made such a fuss about its failure to *require* them. Thornton Br. at 16. Also, they insist that the Convention's failure to delegate power *to Congress* to set qualifications means that it must have intended to withdraw such power from *the States*. These arguments fail for the following reasons:

First, respondents erroneously presume that a higher legislative body in the constitutional scheme (such as the Convention or Congress) preempts legislation by a lesser body (such as a State legislature) simply by declining to enact legislation. Any such argument is logically flawed even apart from the Tenth Amendment's reservation of authority to the States and the People.

Second, respondents claim that anti-federalists would not have opposed the Constitution vigorously for its failure to *require* term-limits, if they had believed that States were free to enact them on their own. This claim is belied by the Articles of Confederation. Under the Articles, States undoubtedly *were* permitted to impose term limits on their delegates to Congress. *See* Articles of Confederation, Article V ("delegates [to Congress] shall be annually appointed in such manner as the legislature of each State shall direct"). But the Articles also *imposed* national term limits directly. *See id.* ("no person shall be capable of being a delegate for more than three years in any term of six years").

Respondents assume the anti-federalists would have readily accepted the lack of national terms limits if State term limits were permitted by the Constitution. But as recent history shows, where term limits are not absolutely mandated, States have the incentive to return incumbents so as to gain more than their share of federal benefits. Given this collective action problem, unless States jointly agree to term limits, or act altruistically, the practical ability of States to limit terms

unilaterally is considerably diminished. The anti-federalists waged war over this issue, not because the Constitution foreclosed States from imposing term limits, but because it, unlike the Articles, did not require them.

Third, the Framers' fears about delegating power to elected representatives to set what amounts to their *own* qualifications applies with far less force when such qualifications are to be set by another body (such as a State legislature) or the People themselves. *See, e.g*, 2 *Farrand* at 250 (Williamson: "Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body").

Fourth, respondents take rhetorical advantage of confusing usage employed by the Framers. In nearly all debate at the Convention, "Legislature" denotes what we mean today by "Congress." At the Convention, the term "Congress," as used in the modern sense, was first introduced in Article III of the Committee of Detail's draft Constitution. *See* 2 *Farrand* at 177. But this usage never became common, first, because the Committee of Detail draft itself used "Legislature" almost everywhere else (*see, e.g*, Art. III; Art. VI; Art. VII; Art. VIII; Art. X; Art. XI; Art. XIII; Art. XVII); and second because at the time "Congress" was commonly used to refer to the Confederation Congress then assembled in New York. Although opinions from this Court have recognized that "Legislature" often means "Congress," *see Oregon v. Mitchell*, 400 U.S. 112, 290 (1970), respondents overlook this fact.

Considered in this context, respondents' arguments are easily refuted. Their favorite passage, for example, is one from debates over allowing Congress to set property qualifications, in which Madison said he was "opposed to vesting an improper and dangerous power in the Legislature" because "[t]he qualification of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 *Farrand* at 249-50. In invoking this passage,

respondents commit errors one, three and four described above. To summarize: The Convention could not possibly preempt State action by *declining* to delegate power to Congress. Madison's desire to fix qualifications in "the Constitution" is answered by fixing them in a *State* Constitution, beyond the reach of legislators. And Madison's reference to the "Legislature" obviously refers to Congress, not to all federal and state legislative bodies. Respondents' other favorite sound bites include statements by Hamilton, *see* Hill Br. at 15; United States Br. at 13 (committing errors one and four in invoking *The Federalist* No. 60); Gilbert Livingston, *see* Thornton Br. at 24 n.24; United States Br. at 14 (error two in invoking a speech at the New York ratifying convention); and Melancthon Smith, *see* Thornton Br. at 27; United States Br. at 14 (same).

Respondents also place great store in what supposedly was *not* said at the Founding. Thus, they claim that "[n]o proponent of ratification attempted to blunt . . . criticism [of the Constitution] by arguing that states could set term limits or other added qualifications." Hill Br. at 17. But, in addressing disqualifications during the Massachusetts ratifying convention, Rufus King:

> observed that no such [property] qualification is required by the Confederation. In reply to Gen. Thompson's question, why disqualification of age was not added, the honorable gentleman said, that it would not extend to all parts of the continent alike. Life, says he, in a great measure, depends on climate. What in the Southern States would be accounted long life, would be but the meridian in the Northern; what here is the time of ripened judgment is old age there. Therefore the want of such a disqualification cannot be made an objection to the Constitution.

2 *Elliot* at 36.

This passage makes apparent that the shared assumptions of King and his audience were (1) that national property qualifications were left in Philadelphia as they had

been under the Confederation (with State authority unquestioned); and (2) that Article I includes a list only of those qualifications that are, in Madison's phrase, "susceptible of unformity," not of all qualifications that States might want to impose. Nor can King's assumptions be lightly dismissed: King was, along with Madison, Wilson, and Gouverneur Morris, one of the leading federalists at the Convention. *See* Warren at 160. Moreover, like Madison and Hamilton, he was also a member of the Committee on Style. *Id.* at 686.

Fittingly, however, it is Madison himself who delivers the knockout blow to respondents' historical argument. In *The Federalist* No. 52, Madison states that "[t]he definition of the right of suffrage is very justly regarded as a fundamental right of republican government." *The Federalist* No. 52 at 326 (Madison) (Clinton Rossiter ed., 1961). This passage recalls his speech during the Convention debate over Congressional power to set qualifications, where he stated specifically that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 *Farrand* at 249-50. But in the very next paragraph of the Federalist, Madison continues:

> The qualifications of the elected being less carefully and properly defined by State constitutions, and being at the same time more susceptible of uniformity, have been very properly *considered and regulated* by the Constitution.

The Federalist No. 52 at 326 (emphasis added). The contrast between these closely parallel passages could not be more striking—or more important. When discussing Congressional power, Madison says qualifications are properly *fixed* by the Constitution. But when discussing State qualifications, he says they have been *considered and regulated*, but not fixed. Read together, Madison's statements strongly reconfirm the plain

meaning of the Disqualification Clauses and the Tenth Amendment.[7]

C. Interpretations of the Constitution in Congress. With the Constitutional text and history all adverse, respondents look for shelter in Congress's application of the Disqualification Clauses. They gamely attempt to revive the *McCreery* election case as a basis for arguing that Congress has considered state-imposed qualifications impermissible, *see, e.g.*, Thornton Br. at 33-34; but to no avail, *see* Opening Br. at 7-8. Respondents also claim that the seating of Illinois Congressman Samuel Marshall and Illinois Senator Lyman Trumball in 1856 supports their contention that States may not add qualifications. *See* Hill Br. at 22. Tellingly, however, a mere three years later, Congress expressly approved a Kansas constitution containing the very provision that respondents claim the earlier Congress had deemed unconstitutional. *See* Kansas Const. of 1859, Art. III, § 13 (in *The Federal and State Constitutions* at 1249 (Thorpe ed., 1907)).

Fortunately, there is more recent and definitive Congressional authority on this issue—authority that establishes unambiguously Congress's view that States could,

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[7] Space has limited our response to many of the "historical" arguments made by respondent Thornton. Suffice it to say, however, that he stretches history mightily in many places. This can be seen, *inter alia*, in his treatment of Committee of Detail's proposal to delegate authority to set "uniform" property qualifications to Congress. In the space of just three pages, Thornton: (1) joins in a single sentence two statements made by John Rutledge in separate speeches advocating two different proposals, *see* Thornton Br. at 17; (2) asserts that Oliver Ellsworth "proposed to delegate property qualifications for federal legislators to the States," *id.*, when in fact Ellsworth said nothing about State authority, but addressed only whether *Congress* should be constrained to setting "uniform" qualifications; (3) claims that "no delegate seconded" supposed proposals by Rutledge and Ellsworth, *id.*, when neither Rutledge nor Ellsworth made a motion calling for a second; and (4) supports the proposition that the religious-test ban was intended "to ensure that the Constitution's 'oath' requirement did not itself create a religious test" solely with citations to *Farrand* that simply restate the text of the provision, *id.* at 19 n. 18.

indeed, impose additional qualifications for Congressional office. In 1899, the House debated whether Brigham Roberts, a known polygamist from Utah, could take a seat in the House. *See* Case of Brigham H. Roberts, 1899, *reprinted in* 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 474-480 at 518-560 (1907). A House committee majority found that Roberts was not disqualified under any provision of the Constitution, but would not recommend seating him. The committe's report expressly rejected the notion that the disqualifications in the Constitution are exclusive, saying: "the language of the constitutional provision [Art. I, sec. 2, cl. 1], the history of its framing in the Constitutional Convention, and its context clearly show that it can not be construed to prevent disqualification for crime," 1 Hinds § 476 at 521-22.

On this Committee's recommendation, an overwhelming majority of the House voted to disqualify Roberts. It is telling that the minority disagreed only on the grounds that the federal law used to disqualify Roberts did not constitutionally apply beyond the territories and that Utah itself had not disqualified Roberts—not that there could be no disqualifications other than those in the Constitution. *Id.* at 554-57. In short, although the power of *Congress* to impose the qualification was contested, both the majority and minority agreed that States may impose such qualifications.

CONCLUSION

Having failed to find a prohibition on State-imposed qualifications in the Constitutional text or history, respondents are left with the stray dicta from this Court's decision in *Powell*. But *Powell* held only that one House of Congress may not impose *ad hoc* qualifications. It did not reach the question presented—whether the States and the People may impose qualifications beyond those found in the Disqualification Clauses. In light of the Tenth Amendment and the above discussion, this question must be answered in the affirmative. The decision below should be reversed and remanded.

Respectfully submitted,

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